> be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."

In *Gitlow* the only overt acts were advocacy of overthrow and publication of the writings that contained the advocacy. *Id.*, at 655. *Gitlow* and its progency, including *Whitney* v. *California*, 274 U. S. 357, went into the discard with our decision in *Brandenburg* v. *Ohio*, 395 U. S. 444. In that case the indictment charged advocating terrorism "by word of mouth" as a method of political reform and assembly for the purpose of such advocacy. We held that neither advocacy nor assembly in order to advocate political action may be made punishable.

Brandenburg, however, is of no help to these petitioners. For while some of the counts embrace only advocacy or acts which fall within its penumbra, still others are in the field of activities far removed from the protection of the First Amendment. There is a question concerning some of the overt acts—whether, as I asked in my dissent in *Epton* v. *New York*, 390 U. S. 29, 30, a constitutionally protected right such as speech or assembly may be used as an overt act in furtherance of a conspiracy. But other overt acts relate to the acquisition of weapons, gun powder, and the like, and the storing of gasoline to start fires. Persuasion by such means plainly has no First Amendment protection.

It therefore cannot be said that the cases against Samuels and Fernandez are palpably unconstitutional. It is for the state courts to preserve such First Amendment rights as may be involved here. Certainly by sifting out the chaff from the charges through motions to strike, instructions to the jury, and other procedural devices violence had no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of "advocacy."

SUPREME COURT OF THE UNITED STATES

Nos. 7 and 9.—October Term, 1970

George Samuels et al., Appellants, 7 *v.* Thomas J. Mackell, District Attorney, et al. Fred Fernandez, Appellant, 9 *v.* Thomas J. Mackell, District Attorney, et al.	On Appeals From the United States District Court for the Southern District of New York.

[February 23, 1971]

Mr. Justice Brennan, with whom Mr. Justice White and Mr. Justice Marshall join, concurring in the result.

I agree that the judgment of the District Court should be affirmed. All the appellants had been indicted for violation of the New York Criminal Anarchy Law before their suit in federal court was filed. They have not alleged facts amounting to bad faith harassment. Therefore, neither a declaratory judgment nor an injunction would be proper. *Perez* v. *Ledesma, post.* (Opinion of Brennan, J.)